QUESTIONS PRESENTED

1. Whether a state court may properly determine sincerity of a pro se defendant's threatened tactic of remaining mute at trial.

2. Whether a state court can consider police officers' testimony regarding the status and focus of their investigation in determining whether a defendant is in custody for *Miranda* purposes.

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No. 93-5770

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROBERT EDWARD STANSBURY, Petitioner,

vs.

STATE OF CALIFORNIA, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion by the California Supreme Court is reported at 4 Cal.4th 1017, 846 P.2d 756, 17 Cal.Rptr.2d 174 (1993). The opinion was modified upon denial of rehearing at 5 Cal.4th 294d, 19 Cal.Rptr.2d [Advance Sheets No. 3 at Modifications, p. 13.] (1993).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

On May 22, 1985, a Los Angeles County jury convicted petitioner of the first degree murder (Cal. Penal Code § 187)[1] of ten-year old Robyn Jackson; lewd acts on a child under the age of 14 (§ 288(b)); rape (§ 261(2)); and kidnapping (§ 207). The jury found true the three charged special circumstances that the murder was committed in the commission of kidnapping (§ 190.2(a)(17)(ii)); in the commission of a rape (§ 190.2(a)(17(iii)); and in the commission of a lewd and lascivious act upon a child under the age of 14 years (§ 190.2(a)(17)(v)). The jury also found true allegations that petitioner inflicted great bodily injury in connection with the noncapital offenses (§§ 1203.075, 12022.7, 12022.8) and that petitioner committed the offenses while on parole for rape and lewd acts upon a child under the age of 14 years (§§ 1203.085(a), 3000). CT 1130-1139; *People* v. *Stansbury*, *supra*, 4 Cal.4th at 1031, 846 P.2d at 762, 17 Cal.Rptr.2d at 180.

On May 3, 1985, the same jury returned a sentence of death. CT 1155. The court entered its judgment of death on July 15, 1985. CT 1156-1159.

Petitioner appealed. On March 8, 1993, the California Supreme Court issued its opinion affirming the judgment in its entirety. *People* v. *Stansbury*, *supra*, 4 Cal.4th 1017.

Petitioner does not challenge the sufficiency of the evidence to support his convictions. We therefore adopt the summary of facts from the state court opinion:

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1. Unless otherwise indicated, all statutory references are to the California Penal Code.

"On September 28, 1992, defendant, a tall red-headed man with a beard, drove an ice cream truck on a sales route around the Baldwin Park neighborhood of Los Angeles. He accidentally drove the truck into a fence around 5 p.m. and he cooperated with the property owner in trying to fix the fence. The owner observed nothing wrong with defendant's truck; it appeared to operate normally. Defendant left the scene between 5:30 and 5:45 p.m. A competing ice cream truck driver also saw defendant in the neighborhood that afternoon, and again, his truck appeared to be functioning well and traveling at speed.

"[Ten year old] Robyn went to the Geddes School in Baldwin Park around 6 p.m. that evening. A neighbor saw a white ice cream truck near the school about that time, and the neighbor's son saw Robyn talking to the ice cream truck driver in front of the school. The boy looked away, and when he looked back, Robyn was not to be seen and the truck was making a U-turn and driving away. He identified the driver as a man with red hair and a beard. The child said that Robyn often talked to the ice cream truck driver and, unlike any of the other neighborhood children, received gifts of candy and ice cream from him. He identified a picture of defendant as he looked with long hair and a beard as the driver of the ice cream truck Robyn frequented.

"Beverly Allen, a gas station attendant, saw a large white ice cream truck arrive at her station about 6:30 p.m. on September 28, 1982. Her

Sears U.S.A. gas station was located in Covina, and she saw the truck arrive from the east on Arrow Highway. She saw a young man (not defendant) with blond hair buy gas and ask someone in the truck to be dropped off by the freeway. Mrs. Allen saw defendant standing by the passenger door of the truck, and observed Robyn inside, looking unhappy. Mrs. Allen was somewhat uncertain about her identification of defendant.

"Defendant did not return to his home in Pomona until 9 p.m. that evening. He borrowed his roommate's turquoise automobile around midnight, first driving it next to his truck for a few minutes. He returned around 3 a.m.

"About 1:15 a.m. Andrew Zimmerman saw the turquoise car in Pasadena. He saw a large person get out of the car, the door of which made a memorable popping sound, and throw something in a flood control channel. Mr. Zimmerman telephoned the police, who arrived about 1:30 to discover the body of Robyn in the flood control channel. Mr. Zimmerman positively identified defendant's roommate's car as the one he had seen that night.

"There was medical evidence that before her death, Robyn had been put in a cold, oxygen-deprived environment, such as an ice cream freezer. There was evidence of a rape, and there was evidence of saliva deposited by a nonsecretor on the victim's genital area and nipple. The victim was a secretor; defendant, like only 20 percent of the population,

was not. The cause of death was asphyxia complicated by blunt force trauma to the head. The coroner was of the opinion that Robyn died when her head struck the concrete floor of the flood control channel.

"Defendant spoke to the police on the night after the crime, and said he had seen Robyn the day before about 6 p.m. He said he left her about that time, and continued his route. He said his truck had not been operating properly, and he had been compelled to take a circuitous route home via the Arrow Highway, to avoid hills. He said he stopped for gas at an off-brand station on the Arrow Highway. He explained that he spent the evening watching television and dozing, and that when he woke around midnight, he borrowed his roommate's car to go get something to eat at the Sambo's restaurant on Indian Hill Boulevard in Claremont. A waitress who worked at the restaurant and was familiar with defendant testified that he had not been there that night.

"A Los Angeles County jail inmate testified that defendant told him he had offered a little girl some ice cream or candy to get her to go around and sell his wares with him. Defendant said he was being charged with the murder of this little girl. . . .

[At the penalty phase] "The prosecutor presented evidence that when defendant was 20 years old, he violently assaulted and sexually abused 2 boys, then ages 10 and 9. He threatened to kill the children, and forced one to dig a grave. Defendant was convicted of lewd conduct

with a child for these activities. Another witness described defendant's crimes against her; he offered to help her after she experienced car trouble, but instead beat her, raped her, and took her valuables. He held a knife to her back and spoke of disposing of her body. He was convicted of rape, robbery and kidnapping.

"Both witnesses spoke of their humiliation, rage and fear after these traumatic events.

"Evidence was also presented of defendant's convictions for the armed rape of a 14-year-old girl, for a later offense of kidnap and rape of an adult woman, and for possession of a firearm by an ex-felon.

"Defendant's parole officer testified that defendant told him he was unemployed. The officer testified that he would not have permitted defendant to be employed as an ice cream truck driver in light of his history of violent sexual offenses against children.

"Defendant presented no evidence and did not argue to the jury." *People v. Stansbury, supra*, 4 Cal.4th at 1031-1034, 846 P.2d at 762-764, 17 Cal.Rptr.2d at 180-182.

REASONS FOR DENYING THE PETITION

I

THE STATE TRIAL COURT AFFORDED PETITIONER THE RIGHT TO CONDUCT HIS OWN DEFENSE

Petitioner represented himself at trial with the assistance of two court-appointed attorneys. 4 Cal.4th at 1036. The state trial court entertained and resolved numerous pretrial motions filed by petitioner. CT 420-856. The state trial court expressly acknowledged petitioner's right to control the defense when it addressed assistant counsel, "'[E]ach of you who are assisting him must realize that the decisions that are made in this case are his decisions to make.'" 4 Cal.4th at 1040 n. 10, 846 P.2d at 768, 17 Cal.Rptr.2d at 186.[2/]

Petitioner claims that the trial court interfered with his choice of tactics by threatening to replace him with counsel if he remained mute throughout the proceedings. Petitioner attempted to obtain a continuance by use of coercion, indicating that he might be forced to remain silent. RT 4101, 4164. The trial court indicated that if petitioner refused to participate in the proceedings that counsel might

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2. Although petitioner complains that the trial court erroneously interfered with his purported decision to remain mute at the guilt phase, he complained in his state court appeal both that the trial court interfered with his decision to remain mute at the guilt phase and that the trial court erroneously permitted him to remain mute at the penalty phase.

> "Defendant limits this claim to the pretrial proceedings and the guilt phase. As will appear, he takes the opposite position in attacking the penalty portion of the judgment, contending that in the penalty phase the court should have intervened in his case and even terminated his pro se status on its own motion." 4 Cal.4th at 1037 n. 4, 846 P.2d at 766, 17 Cal.Rptr.2d at 184.

have to take his place. RT 4158. The court was concerned with the implications of petitioner's failure to participate. The court afforded petitioner the opportunity to consider his ultimate defense since actual jury voir dire would not begin until weeks later. The trial court simply did not accede to petitioner's efforts to further delay the proceedings. The court indicated that petitioner could think about the tactics he would employ:

> "*I'm going to give you an opportunity to reflect on that.* And I'll ask you again what your attitude is before we start the voir dire. [¶] But let us assume that I decide that maybe it is a legitimate tactic, and you were able to convince me sometime between now and then. [¶] I want you to understand how high the roll of the dice is . . . [¶] And *at this point,* I'm indicting that my attitude is if you persist in not expressing your desire not to present any kind of cross-examination of witnesses, that is tantamount to a conviction, it is irresponsible, I believe, on my part to allow you to proceed with that tactic. [¶] I'll give you an opportunity to respond to that if you can find some authority and convince me that I'm wrong." RT 4181 (emphasis added).

Petitioner threatened to be obstructionist; the trial court indicated that petitioner would not be permitted to disrupt the proceedings. Petitioner did not actually attempt to carry out his threat of remaining mute. Apparently he thought better of this threatened maneuver after the court denied his request for continuance. Thus, he cannot complain that he was prevented from presenting his own defense.

The state courts acknowledged that a self-represented defendant may elect to stand mute as a defense tactic.

> "We have recognized that in some circumstances a defendant representing himself, unlike counsel, may elect to refuse to participate actively in his defense. (*People* v. *Teron*, 23 Cal.3d 103, 115 (1970); *People* v. *McKenzie*, 34 Cal.3d 616 (1983); see also *United States* v. *Clark*, 943 F.2d 775, 782 (7th Cir. 1991); *Savage* v. *Estelle*, 924 F.2d 1459, 1464 (9th Cir. 1990), fn. 10; *United States* v. *McDowell*, 814 F.2d 245, 250 (6th Cir. 1987).)" *People* v. *Stansbury*, *supra*, 4 Cal.4th at p. 1041, 846 P.2d at 769, 17 Cal.Rptr.2d at 187.

The state courts merely determined that petitioner did not sincerely intend to stand mute as a defense tactic during the guilt phase. See *People* v. *Clark*, 3 Cal.4th 41, 114-115, 833 P.2d 561, 598, 10 Cal.Rptr.2d 554, 591 (1992).

The California Supreme Court's analysis of the issue correctly looks to the legitimacy of the criminal defendant's threatened tactics. A fair reading of the record in this case does not establish that petitioner actually wanted to remain silent but rather that he attempted to manipulate the trial court into acceding to his demands.

> "A reasonable inference that can be drawn from the record is that defendant never actually intended to stand mute at the guilt trial, and that his intermittent threats to do so were simply attempts to pressure the court into agreeing to his procedural demands, to delay the trial, and to interject error into the proceedings." 4 Cal.4th at 1041, 846 P.2d at 769, 17 Cal.Rptr.2d at 187.

The California Supreme Court's factual determination relating to the legitimacy of petitioner's threats does not serve as a basis for review by this Court. Although petitioner objects to the state courts' evaluation of the sincerity of his threat, the validity of petitioner's claim necessarily involves a factual resolution. The mere threat to remain mute should not preclude inquiry by the trial court or an immediate acquiescence to that extreme tactic. Where, as here, the defendant established a pattern of obstructionist behavior whenever he failed to obtain favorable rulings from the trial court, the state courts could reasonably determine from the record that petitioner's claimed threats were insincere.[3/]

> "[T]he court retains authority to determine whether defendant's expressed desire to stand mute is sincere, or whether it is an attempt to coerce the court. Here, the court went beyond that task by also expressing the opinion that defendant would not have a fair trial if he stood mute; nonetheless, the court also made it clear that defendant's reason for standing mute was not that he had no defense, or that he thought silence was the best defense, but that he was not pleased with the way things were going and thought he was sure to get a second trial where things would go his way. We see no error in a court refusing to permit a

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3. The fact that petitioner's "desire to stand mute was insincere and manipulative is further demonstrated by his earlier threat to do the same thing." 4 Cal.4th at 1044, 846 P.2d at 771, 17 Cal.Rptr.2d at 189.

> defendant to stand mute at trial, when that defendant is attempting to manipulate the legal system while operating under such a basic misapprehension." 4 Cal.4th at 1044, 846 P.2d at 771, 17 Cal.Rptr.2d at 189.

It is almost invariably true that the intent of a criminal defendant presents a question of fact for the trier of fact to determine. For instance, a jury must decide whether a defendant charged with burglary intended to commit larceny or some other felony when he entered the dwelling of another. Indeed, the defendant is constitutionally entitled to have this issue treated as a question of fact. *E.g., Carella* v. *California*, 491 U.S. 263, 265 (1989) (*per curiam*). Similarly, the state courts may reasonably determine a pro se defendant's motivation when threatening to pursue a particular course of action at trial. As this court observed, "that an issue involves an inquiry into state of mind is not at all inconsistent with treating it as a question of fact." *Miller* v. *Fenton*, 474 U.S. 104, 113 (1985). The state courts reasonably determined that petitioner's threats were merely efforts to manipulate the trial court's rulings.[4/] Therefore, the state courts' findings should not serve as a basis for review by

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4. The California Supreme Court contrasted the trial court's rulings at the guilt phase with its noninterference with petitioner's decision to remain mute at the penalty phase:

> "In both instances at the guilt trial. . . the trial court justifiably thought that defendant was being manipulative, and that his desire to stand mute was not a sincere decision that this would be the best defense, but an attempt to interject error and delay into the proceedings. By contrast, as to defendant's decision to stand mute at the penalty trial, defendant had made it clear throughout the proceedings that if he were convicted, he would seek the death penalty, and that no defense was to be prepared."

this Court.

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4 Cal.4th at 1046, 846 P.2d at 772, 17 Cal.Rptr.2d at 190.

II

PETITIONER WAS NOT IN CUSTODY WHEN INTERVIEWED BY THE POLICE

Petitioner claims that statements he made to the police violated his *Miranda* rights. Petitioner further complains that the California Supreme Court applied only a subjective standard in determining whether petitioner was in custody during the interview. Neither claim has merit. Furthermore, neither issue requires review by this Court.

A. Factual Background

Baldwin Park police officer Joseph Lee was instructed by the homicide detectives in charge of the Robyn Jackson case to contact petitioner as a possible witness. RT 2030, 2032. Officer Lee was not an investigating officer in the case. RT 2030. Lee was given petitioner's address at a trailer park, and instructed to ask petitioner to go to the police station for questioning as a potential eyewitness. RT 2032, 2036. Petitioner was not a suspect in the case. RT 2032. Lee was not told to arrest petitioner if petitioner refused to be questioned. RT 2032. Lee had no information about petitioner's criminal history or prior convictions. RT 2035.

When he arrived at petitioner's trailer, Lee identified himself as a police officer and asked petitioner to go to the Pomona police department for an interview as

a possible witness.[5] RT 2036. Lee indicated that petitioner could drive himself or the police could provide transportation if petitioner had no means of getting to the police station on his own. RT 2036. Petitioner agreed to the interview. Lee gave him a ride in the front passenger seat of the unmarked police car. RT 2036-2037. Petitioner was not handcuffed in the car. Lee did not question petitioner. Lee accompanied petitioner to an interview room at the Pomona police station and then contacted homicide investigator Johnston. RT 2039.

On September 29, 1982, Johnston was looking for an individual who drove a turquoise automobile; Johnston had interviewed a witness who saw the driver of this automobile dump the child's body. RT 2062. The turquoise car provided the only solid link to the murderer. Johnston was attempting to locate all possible witnesses to the kidnapping, and to that end learned from a Baldwin Park police officer that petitioner had been involved in a traffic accident in the area where the child disappeared. RT 2063. Johnston had information that two ice cream trucks had been in the Baldwin Park area. RT 2089. The information he received indicated that the child had been seen near a blue ice cream truck operated by a Black male.[6] RT

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5. Neither Lee nor the accompanying officers ever pointed their guns at petitioner and the location of Lee's weapon prevented petitioner's view of the weapon. RT 2059, 2181-2182. Furthermore, the officers holstered their firearms while Lee spoke with petitioner. RT 2052-2053.

6. Johnston testified that Donald Helmer gave information to the police that the victim was seen talking to a black male in a blue ice cream truck at about five o'clock on the evening of her disappearance. RT 2126-2128, 2148. Jeremy Ramos, a five year old, initially told the police that he last saw the victim talking to a black male in a blue ice cream truck. RT 2128-2129, 2148, 2171.

2126-2127, 2129-2130. Johnston contacted the Black driver, Yusuf Nyanganira[7/] to interview him about his knowledge of the case. RT 2064. By contrast, Johnston asked the local officers to contact petitioner for an interview; he never indicated or even intimated that petitioner was a suspect. RT 2064, 2206. Johnston wanted to talk to petitioner because petitioner was in the vicinity of the kidnapping, not because he was a suspect. RT 2134. No homicide investigator went to petitioner's residence. RT 2033, 2039-2040. If petitioner had been a suspect, a homicide investigator would have been dispatched to assist in his apprehension. RT 2065.

After petitioner arrived at the Pomona police station, Johnston and Baldwin Police Officer Bell spoke with petitioner in an interview room.[8/] Petitioner was not in custody or in any way restrained. Petitioner was not considered a suspect and could have left if he had so desired.[9/] RT 2067, 2211. Petitioner never indicated that

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Johnston later testified that the information he had obtained "led more specifically to a male, black having been last seen in contact with Robyn Jackson following her leaving her residence after eating dinner." RT 2250.

7. Appellant's truck was white; appellant is Caucasian. Yusuf was Black and drove a blue ice cream truck. RT 2131. Johnston accompanied four police officers to Yusef's residence, but not to petitioner's residence.

> "Johnston was more suspicious of the other driver, as he met the description the officer had of the driver seen with Robyn just before she disappeared, while defendant did not." 4 Cal.4th at 1051, 846 P.2d at 775, 17 Cal.Rptr.2d at 193.

8. Officer Bell was an observer only and not a member of the homicide investigation team. Only after suspicion had focused on appellant did Johnston summon the other two homicide investigators. RT 2138.

9. The difficulty associated with accessing detective offices after normal business hours and the officers' lack of familiarity with the facilities fully explain the choice of interview rooms. Johnston did not know if the door to the interview room was locked

he wished to leave.

Johnston had no information that petitioner was seen with the child around the time of her disappearance. RT 2171. Johnston asked petitioner about his employment and his activities the previous day. RT 2068. Johnston showed Robyn Jackson's photograph to petitioner to determine whether petitioner could give any information about her whereabouts the previous day or about any vehicles he may have seen that day. RT 2073. Johnston attempted to obtain descriptions of all individuals petitioner saw in the area in an effort to identify potential witnesses. RT 2076, 2137.

Johnston became suspicious of petitioner when petitioner referred to a turquoise automobile, the vehicle Johnston was attempting to locate. RT 2116, 2122. When petitioner told Johnston that he had access to a turquoise automobile, Johnston asked petitioner about prior arrests. Johnston did not have any information regarding petitioner's criminal history before this inquiry. RT 2078. Petitioner told Johnston that he had prior convictions for kidnapping, rape, and child molestation. RT 2079. Johnston then terminated the interview and left petitioner alone in the interview room. RT 2079. The interview lasted approximately 20 to 30 minutes. RT 2200, 2228. Johnston and the other two homicide investigators, Patterson and Riordan, reentered the room and advised petitioner of his *Miranda* rights. RT 2081. Petitioner invoked his *Miranda* rights and the detectives did not question him further. RT 2082.

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when he spoke with petitioner. RT 2102. Nothing in the record indicates that petitoner would know that the room was locked when the interviewing officers were not aware of that fact.

Appellant did not testify at the suppression hearing. He did not offer any evidence to refute the police testimony.

At the conclusion of the hearing, the trial court determined that appellant was not the focus of suspicion at the time he was interviewed. He became a suspect only after he described the turquoise automobile to which he had access on the morning the body was dumped. RT 2368. The court excluded any statements made after reference to this automobile but denied the defense motion as to prior statements. RT 2368.

B. Petitioner Was Not in Custody

Petitioner was interviewed at the police station at approximately 11 p.m. on September 29, 1982. The homicide investigators were attempting to locate witnesses to the recent murder of ten-year old Robyn Jackson. The officers who accompanied petitioner to the police station were not directly connected with the investigation. They simply requested that petitioner make himself available for questioning at the police station.

Petitioner was afforded the opportunity to decide whether the police could question him. Although the officers had their guns drawn before petitioner answered the door, Officer Lee was the only officer to speak with petitioner. Officer Lee's weapon was not visible to petitioner. No evidence elicited at the hearing established that petitioner could see the other officers' weapons or that the weapons remained drawn during Lee's conversation with petitioner. Although no officer ever

pointed a gun at petitioner, petitioner complains that the officer was fully armed and uniformed. Officers routinely are both; the *important* point is that Officer Lee and Lieutenant Johnston did *not* question petitioner at gunpoint or threaten him in any way. Petitioner voluntarily agreed to the interview. He chose to ride with Officer Lee. He sat in the front seat of the police vehicle, not normal procedure for one in custody.

Officer Lee merely brought petitioner to an interview room.[10/] RT 2056-2057. Petitioner spoke to Lieutenant Johnston about his activities. Johnston asked petitioner about individuals seen in the Baldwin Park area in an effort to locate potential witnesses. The interview was investigatory rather than accusatory in nature. Petitioner was not in custody and could have left upon request. Petitioner never indicated a desire to leave or to terminate the interview. Petitioner's statements were largely narrative and Lieutenant Johnston did not intimidate or coerce petitioner into cooperation. Questioning a witness about his activities on the day of a murder does not establish a custodial interrogation but rather an effort to investigate.[11/]

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10. The fact that the interview room was secured is not determinative but rather related to the available facilities. See *Green* v. *Superior Court*, 40 Cal.3d 126, 136, 707 P.2d 248, 254, 219 Cal.Rptr. 186, 192 (1985), cert. den., 475 U.S. 1087 (1986).

11. Petitioner states that no one told him that he could leave or that he did not have to accompany Officer Lee to the police station. Officer Lee, however, testified that he told petitioner that petitioner was a potential *witness* and that he could drive to the police station on his own. Implicit in this communication was the recognition that petitioner did not have to accompany the officers. Petitioner never asked the officers to permit him to leave. Nor does the law require the police to have affirmatively informed petitioner that he was free to leave. *Cf. Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248-249 (1973). No indicum of custody other than the police station itself was present here in any event.

Petitioner seeks to require the police to give *Miranda* warnings to all witnesses interviewed at the police station because of the potentially intimidating environment. But this Court has specifically rejected this argument. Police must be permitted to interview witnesses and even potential suspects. The critical inquiry is whether the individual is in custody when the police question him.

In general, *Miranda* warnings are required prior to questioning when a person has been taken formally into custody *or* otherwise deprived of his liberty in any significant way, *or* led to believe, as a reasonable person, that he has been thus deprived. *Berkemer* v. *McCarty,* 468 U.S. 420, 423-424 (1984); *Oregon* v. *Mathiason,* 429 U.S. 492, 494-496 (1977).

> "Although the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody' for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983), quoting *Oregon* v. *Mathiason*, *supra*, 429 U.S. at 495.

A non-custodial situation is not converted to one in which *Miranda* is required simply because it takes place in a coercive environment, such as a police station, since all interviews of persons suspected of crime have coercive aspects. *California* v. *Beheler*, *supra*, 463 U.S. at 1124.

A fair reading of the record demonstrates that petitioner voluntarily went to the police station and gave the police information about his activities. He informed

the police about individuals he saw in the area that day to permit the investigators to question other possible witnesses.

> "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But *police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.* Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody'. It was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited." *Oregon* v. *Mathiason*, *supra*, 429 U.S. at 495 (emphasis added).

Petitioner was not in custody and the indicum of formal arrest were absent.

The state trial courts' evaluation of the credibility of the officers' testimony at the suppression hearing is a factual determination not subject to review by this Court. The officers' conduct indicated that petitioner was a witness whose information was part of a murder investigation. No information or actions suggested that the police had focused on petitioner as a suspect, whose freedom would be curtailed.

"All the police officers involved testified that defendant was not

considered a suspect until that point [when petitioner mentioned the turquoise car] in the interview. Defendant was invited, not commanded, to come to the police station for an interview, and he was given the option of driving himself. . . . [T]he officers involved testified that they would have honored his refusal to come to the station, and that they would have let him go during questioning if he had so requested . . . . [A]t the time of the interview the police were following many leads. They had not decided that the perpetrator was probably the driver of an ice cream truck, let alone that it was defendant. They had only a small child's observation to connect the abduction to an ice cream truck driver, while an adult witness had actually seen the victim removed from a turquoise passenger car and flung into a ditch. Defendant's insistence that suspicion had focused on him because he was an ice cream truck driver who had been seen talking to the victim an hour before her abduction ignores the state of information available to police at the time of the interview." 4 Cal.4th at 1052, 846 P.2d at 776-777, 17 Cal.Rptr.2d at 194-195.

Petitioner was not the focus of the investigation and was not treated in a manner which indicated that he was in custody.

C. **Objective Standard of Review**

Petitioner complains that the California Supreme Court looked only to

the subjective intent of the officers in determining whether petitioner was in custody. The court's opinion demonstrates that the officers' knowledge and intent were relevant to a determination of whether petitioner was in fact placed in custody. Nevertheless, the state court looked to objective facts and circumstances in making its determination regarding custody.

> "Defendant notes that he was on parole at the time of his encounter with the police, and that this must be considered to have strengthened his impression that he had no choice but to cooperate. But neither the officers who contacted him nor the officers who interviewed him knew he was on parole. Their conduct would not suggest *to the reasonable person* that they were exerting authority over him under the terms of the conditions of his parole. They solicited his voluntary cooperation, asked if he wanted to drive himself to the station, and conducted him there under no restraint. This was hardly an assertion of authority such that *the reasonable person* would consider there was no choice but to obey."
>
> *People v. Stansbury, supra*, 4 Cal.4th at 1053, 846 P.2d at 777, 17 Cal.Rptr.2d at 195 (emphasis added).

Clearly, the California trial and appellate courts looked to the information available to the officers at the time of the interview, as well as the circumstances of the requested interview in determining that petitioner was not in fact in custody during the initial questioning. The state courts applied the appropriate standards and reached the appropriate result. Therefore, this Court need not grant certiorari on this issue.

CONCLUSION

For the foregoing reasons, respondent submits that the petition for writ of certiorari should be denied.

DATED: October 5, 1993

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

ROBERT E. STANSBURY,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

AILEEN BUNNEY, a member of the Bar of the Supreme Court of the United States states:

That her business address is 455 Golden Gate Avenue, Room 6200, in the City and County of San Francisco, State of California; that on October 5, 1993, she served a true copy of the attached Response in Opposition to Petition for Writ of Certiorari in the above-entitled matter on counsel for petitioner by placing same in envelope addressed as follows:

Robert W. Westberg
David S. Winton
Joseph A. Hearst
PILLSBURY, MADISON & SUTRO
225 Bush Street
San Francisco, California 94104

Said envelope was then sealed and deposited in the United States Mail at San Francisco, California, with the postage thereon fully prepaid.

Aileen Bunney
AILEEN BUNNEY
Supervising Deputy Attorney General